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No. 95-56

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORT WAYNE NATIONAL CORPORATION,
Petitioner,

v.

THE INDIANA DEPARTMENT OF STATE REVENUE, and KENNETH L. MILLER, IN HIS CAPACITY AS COMMISSIONER OF THE INDIANA DEPARTMENT OF STATE REVENUE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Indiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

1. Whether a state violates the Contract Clause of the U.S. Constitution by first issuing bonds exempt from all state taxation and then subsequently subjecting those bonds to indirect taxation enacted as a "replacement" for indirect taxes from which the bonds had previously been exempted.

2. Whether violations of the Contract Clause of the United States Constitution are within the scope of the Civil Rights Act 42 U.S.C. § 1983, 1988.

PARTIES BELOW

The caption of the case contains the names of all parties to the proceeding. Petitioner, Fort Wayne National Corporation ("FWNC"), is an Indiana bank holding company doing business predominantly in Indiana. It has no corporate parent and no subsidiaries which are not wholly-owned. Respondent, the Indiana Department of Revenue ("Department"), is a state governmental agency charged with collection, and refund when appropriate, of the Financial Institutions Tax (FIT) Ind. Code § 6-5.5 *et seq.*, levied by the State of Indiana. Respondent Kenneth L. Miller is the Indiana Commissioner of Revenue. In the Indiana Supreme Court The Indiana League of Savings Institutions, Inc., appeared as Amicus Curiae.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	v
REPORT OF OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Facts and Procedural Setting	3
B. Raising the Federal Questions	7
REASONS THE WRIT SHOULD BE GRANTED	7
I. THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS IN THIS AREA	8
II. THE DECISION BELOW PERMITS THE STATE TO RENEGE AND TO IMPAIR ITS BOND (AND OTHER) CONTRACTS	12
III. THE DECISION BELOW LEFT UNANSWERED THE IMPORTANT QUESTION WHETHER THE CIVIL RIGHTS ACT IS AVAILABLE FOR A VIOLATION OF THE CONTRACT CLAUSE OF THE CONSTITUTION	18
CONCLUSION	20

TABLE OF CONTENTS—Continued

APPENDICES Page

A. Opinion of the Supreme Court of Indiana in *Indiana Department of Revenue v. Fort Wayne National Corp.*, 649 N.E.2d 109 (1995) 1a

B. Opinion of the Indiana Tax Court in *Fort Wayne National Corp. v. Indiana Department of Revenue*, 621 N.E.2d 668 (1993) 14a

C. Statutory History showing General Exemption Statute Ind. Code § 6-8-5-1(a): 30a

As in force prior to 1989; and 30a

As amended in 1990 by amendments to Indiana's Financial Institutions Tax; and 30a

As amended in 1991 by further amendments to Indiana's Financial Institutions Tax. 31a

D. Relevant portions of the following documents showing that FWNC raised the Constitutional and federal questions sought to be reviewed: 33a

Brief of Appellee and Cross-Appellant (FWNC) filed with the Indiana Supreme Court; 33a

FWNC complaint in Indiana Tax Court. 41a

E. Section 51 Indiana Gross Income Tax Regulations 1959 ..... 47a

TABLE OF AUTHORITIES

CASES: Page

Appleby v. City of New York, 271 U.S. 364 (1926) 12
Booth v. Sims, 456 S.E.2d 167 (1994), Supreme Court of Appeals of West Virginia 14, 15
Carter v. Greenhow, 114 U.S. 317 (1885) 6, 8, 19, 20
Carylor-Nickel Clinic, P.C. v. Indiana Dept. of State Revenue, Ind. Tax, 569 N.E.2d 765, *aff'd* (1992), Ind., 587 N.E.2d 1311 5
Chemical Bank v. Wash. Pub. Power Supply, 102 Wash. 2d 874, 691 P.2d 524 (1984) 14
Citizens Bank of Louisiana v. Parker, 192 U.S. 73 (1902) 13, 16
Common Council of Peru v. Peru Daily Tribune, 440 N.E.2d 726 (1982) 5
Condell v. Bress, 983 F.2d 415 (2d Cir. 1993), *cert. denied Bress v. Condell*, 6113 S. Ct. 1849 (1993) .. 13
Dennis v. Higgins, 498 U.S. 439 (1991) 19, 20
District Council 33 v. City of Philadelphia, Civ. No. 92-3579, 1993 U.S. Dist. LEXIS 944 (E.D. Pa. 1993) 19
First American National Bank v. Olsen, 751 S.W.2d 417 (Tenn. 1987) 11
Fort Wayne Nat'l Corp. v. Indiana Dep't of State Revenue, 621 N.E.2d 668 (1993) ..... i, 1, 18, 19
Gross Income Tax Division v. Bartlett, 208 Ind. 505, 93 N.E.2d 174, *appeal dismissed* (1951), 340 U.S. 924, 71 S.Ct. 499, 95 L.Ed. 667 5
Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 12
Hughes v. Oregon, 314 Or. 1, 838 P.2d 1018 (1992) 13, 14
In Re Workers' Compensation Refund Western National Mutual Ins. Co., 46 F.3d 813 (8th Cir. 1995) 13
Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp., 649 N.E.2d 109 (1995) 1, 14, 18
J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 4, 9
Lynch v. Household Finance Corp., 405 U.S. 538 (1970) 19

TABLE OF AUTHORITIES—Continued

	Page
McCallen v. Commonwealth of Massachusetts, 279 U.S. 620 (1929), *reh'g denied*, 280 U.S. 513	9, 10
National Life & Accident Ins. Co. v. Dempster, 168 Tenn. 446, 79 S.W.2d 564 (1935)	11
Natural Resources Comm'n v. Porter County Drainage Bd., 576 N.E.2d 587 (1991)	5
Norwest Bank Duluth NA v. McClung, 113 S. Ct. 3026 (1993)	20
Norwest Bank of Duluth NA v. James, 501 U.S. 1246 (1991)	20
Pacific v. Johnson, 285 U.S. 480 (1932)	9, 10
Poirier v. Hodges, 445 F.Supp. 838 (M.D. Fla. 1978)	18
Read v. Beczkiewicz, 215 Ind. 365, 18 N.E.2d 789 (1939)	12
Society For Savings In City For Cleveland v. Bowers, 349 U.S. 143 (1955)	12, 16
State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938)	12, 16, 17
United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)	10-12, 14, 20
Washington v. United States, 460 U.S. 536 (1983)	10

CONSTITUTIONAL PROVISIONS:

U.S. Const. Article I, § 10[1]	*passim*

STATUTES:

28 U.S.C. § 1257(a)	2
28 U.S.C. § 2101(c)	2
42 U.S.C. § 1983	i, 2, 6, 7, 19, 20
42 U.S.C. § 1988	i, 4, 6
Ind. Code § 6-2	4, 6, 9, 15, 16, 18
Ind. Code § 6-5.5	ii, 3-8, 16
Ind. Code § 6-5.5-1-17	6
Ind. Code § 6-5.5-9-4	6
Ind. Code § 6-8-5-1	*passim*

MISCELLANEOUS:

Indiana Gross Income Tax Regulation 1959, Section 51	9

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fort Wayne National Corporation ("FWNC"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered by the Supreme Court of Indiana in this case on April 10, 1995.

REPORT OF OPINIONS BELOW

The opinion of the Indiana Tax Court granting Petitioner's relief as respects its refund claim is reported at *Fort Wayne Nat'l Corp. v. Indiana Dep't of State Revenue*, 621 N.E.2d 668 (1993) [App. B, pp. 14a-29a]. The decision of the Supreme Court of Indiana reversing the Indiana Tax Court is reported at *Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp.*, 649 N.E.2d 109 (1995) [App. A, pp. 1a-13a].

JURISDICTION

Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1257(a). The judgment of the Supreme Court of Indiana was entered on April 10, 1995. This petition is timely under 28 U.S.C. § 2101(c) having been filed within 90 days of the date of the decision of the Supreme Court of Indiana.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

Article I, § 10[1], United States Constitution:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ind. Code § 6-8-5-1(a), as in effect in 1989

> (a) All bonds issued after March 11, 1959, or notes, warrants, or other evidences of indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school

> corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.

Relevant history of the Indiana generic statutory tax exemption for municipal and other bonds subsequent to 1989, Ind. Code § 6-8-5-1, is set forth in App. C at pp. 30a-32a and described in fn 5 at pp. 18-19.

STATEMENT OF THE CASE

A. Facts and Procedural Setting

The case focuses on the ability of the state to renege on its bond contracts. The State of Indiana sought to do so by replacing tax exempt, indirect taxes in effect when the bonds were sold with taxable, indirect taxes. The bonds held by FWNC had been sold as exempt from prior indirect tax by virtue of the state's General Exemption Statute ("GES") Ind. Code § 6-8-5-1. The State then replaced the old indirect taxes with a new indirect tax, the FIT, and amended the GES specifically to except the new FIT from the scope of the exemption from taxation provided by the GES. This rendered taxable the income from the bonds which had previously been exempt from all taxation, both direct and indirect. This about-face reflected a second time over a fifty-plus year period in which municipal bonds had been made subject to tax in Indiana.

In 1932 Indiana enacted a wholly new indirect tax levied on gross income, Ind. Code § 6-2, *et seq.* Based upon the state's characterization of it as a privilege tax, Indiana's gross tax was sustained in *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), against the challenge that it could not constitutionally be applied to municipal bond income from previously outstanding bonds.[1] Thereafter, in Indiana municipal bond income continued to be subject to that state's Gross Income Tax until 1959 when the GES reversed this result by exempting municipal bonds from "all taxation".

Commencing in 1969 FWNC purchased the various municipal bonds which it held on the date in May 1989 the FIT was passed ("Bonds"). The Bonds were advertised and sold as exempt pursuant to the GES from all Indiana tax, including the Gross Income Tax. FWNC's Chief Executive Officer in charge of the bond purchases stated in an uncontested affidavit that he would not have paid the amounts he did for the Bonds if he had understood the GES could be amended so as to permit taxes which were replacements for outstanding taxes, such as the Gross Income Tax, to be applied to the income from the Bonds. The Bonds all had printed upon them a tax opinion referring to the GES (or in certain cases a special counterpart to the GES with substantially similar language) and indicating they were exempt from all Indiana taxation.

In 1989 the Indiana legislature passed the FIT with an effective date of January 1, 1990. FWNC paid under protest the portion of the FIT tax generated by the inclusion of income from its Bonds in the measure of its FIT liability and promptly sought refund of that amount on Contract Clause grounds, together with a claim under section 1988 of the Civil Rights Act, 42 U.S.C. § 1988,

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[1] In the more familiar part of the decision, this Court struck down the tax as applied to interstate commerce. *See, J.D. Adams Manufacturing Co. v. Storen, supra* at pp. 314.

for attorney's fees. The Indiana Tax Court sustained the claim for refund but on a statutory rather than on a constitutional ground. It held that, since the GES had exempted all indirect state taxes in effect when the Bonds were purchased, the Court would construe the FIT, which had replaced the prior indirect taxes, not to apply to previously outstanding bonds, including FWNC's Bonds, in order to avoid the retroactive effect which would result from doing so.

The Indiana Tax Court's conclusion that the GES had previously extended to indirect taxes was based on application of a variety of applicable canons of construction which the Court found both within the text of the GES and in its statutory history. The core of its opinion is set forth at p. 672 (App. B, p. 19a) as follows:

> Prior to the 1990 amendment, the GES excepted from its terms only the state inheritance tax. The exception of only the inheritance tax, like any statutory exception, must be strictly construed. *Natural Resources Comm'n v. Porter County Drainage Bd.* (1991), Ind., 576 N.E.2d 587, 589 (citing *Common Council of Peru v. Peru Daily Tribune* (1982), Ind. App., 440 N.E.2d 726. But it also implies the inclusion of all other taxes, including "measured by" taxes, which existed when the GES was promulgated. *See, e.g., Gross Income Tax Division v. Bartlett* (1950), 208 Ind. 505, 93 N.E.2d 174, *appeal dismissed* (1951), 340 U.S. 924, 71 S.Ct. 499, 95 L.Ed. 667. *See also Carylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue* (1991), Ind. Tax, 569 N.E. 765, 772-73, *aff'd* (1992), Ind., 587 N.E.2d 1311 (discussing the rule of construction of express inclusion and implied exclusion: the enumeration of certain items in a statute or regulation implies the exclusion of items not enumerated). The GES therefore included measured by taxes in its scope.
>
> More importantly, though, the subject matter of the FIT was included within the original GES. The

> FIT is a replacement tax for the gross income tax, adjusted gross income tax, bank tax, savings and loan association tax, and the production credit association tax for financial institutions within the meaning of IC 6-5.5-1-17. *See* IND. CODE 6-5.5-9-4. Like all taxes other than the inheritance tax, these taxes were within the scope of the GES. Taxpayers subject to the FIT are no longer subject to the predecessor taxes. *Id.* The FIT, then, is simply a continuation, albeit in a new form, of taxes long in existence.

Because the Indiana Tax Court's decision was based on statutory grounds, it denied FWNC's claim for attorney's fees under 42 U.S.C. § 1988 for having successfully defended its Contract Clause rights. The Tax Court's opinion also went on to raise various other objections to the application of the Civil Rights Acts, including the proposition that one of the early Civil Rights Act decisions, *Carter v. Greenhow*, 114 U.S. 317 (1885), had held that protection of the Contract Clause was not within the scope of the Civil Rights Act 42 U.S.C. § 1983.

The Supreme Court of Indiana granted review and (without directly addressing any of canons of construction which the Tax Court had found to apply or explaining how it was that the GES had exempted the Gross Income Tax, an indirect tax) reversed the Indiana Tax Court on the merits. Its decision was based upon its conclusion that the GES had *not* ever covered indirect taxes. As so construed, the GES could not contain a legislative promise of protection from indirect taxation, which would then have become a part of the various Bond contracts. The absence of a successful constitutional claim thus mooted any relief under the Civil Rights Acts, and the Supreme Court of Indiana did not expressly address the availability of such relief. This Petition for a Writ of Certiorari follows.

B. Raising the Federal Questions

FWNC raised the federal questions sought to be reviewed at every stage of the state court proceedings. FWNC argued both in the Indiana Tax Court and in the Supreme Court of Indiana that the application of the FIT to Bonds issued prior to the passage of the FIT violated the Contract Clause of the U.S. Constitution and such argument was repeated in its briefs. (App. D, pp. 33a-39a.) Similarly, FWNC has consistently argued that the Civil Rights Act, 42 U.S.C. § 1983, would apply to any Contract Clause claim. (App. D, pp. 40a.)

REASONS THE WRIT SHOULD BE GRANTED

The group of state and local bonds, taken as a class represent one of the largest categories, second only to U.S. bonds, of debt securities issued in the United States. Typically such bonds are issued bearing substantially below market interest rates premised upon and by reason of their tax-free status. It can fairly be said that their tax-free status is at the very essence of the bargain between the bond issuer and the bond buyer. This case raises the fundamental issue whether the states, which are increasingly in search of new revenue, may recant as to outstanding bonds on their promises of tax-free status, may withdraw the essence of the state's commitment all the while retaining the low interest rate which was the consideration for such promise, thereby materially reducing the value of outstanding bonds to their holders. A failure to protect the Indiana bondholders would send a signal to legislators in every state that their bondholders were fair game for virtually any revenue enhancement measure.

Such a result would also confirm the unfortunate impression, which has gained some currency recently in some state court decisions, that the Contract Clause is not a real restriction upon a state's freedom to alter its contracted-for obligations, whether to its bondholders or

to its employees. A review of those cases reveals widely-differing conceptions about the impact of the Contract Clause as a real restraint upon legislative rewriting of state obligations.

At the same time, this Court would have the opportunity to correct a century-old misreading of *Carter v. Greenhow, supra,* under which it is erroneously believed that that case stands for the proposition that the Civil Rights Acts do not extend to Contract Clause claims.

It is also important to understand what this case is not about. It is *not* about the ability of a state legislature to adopt and impose truly new taxes. If the FIT were a truly new tax and not merely a replacement for a tax previously exempted, *i.e.*, if the state were not undoing the benefit of the low rate bargain at the same time it kept on paying interest at the low rates, FWNC would not be complaining.[2] Also, it is not about the ability of a state legislature to repeal or withdraw normal, *non-contractual* tax exemptions or, with proper compensation, to do so even as respects contractual exemptions. It is plain and simple about the ability to promise FWNC that its Bonds would be free of existing tax, both direct *and* indirect, and then to subject them to such tax.

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS IN THIS AREA

The era between World Wars I and II produced new taxes which, when newly-imposed upon previously tax-free municipal bonds, resulted in a series of cases in this

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[2] A purchaser of municipal bonds is interested principally in their yield relative to comparable taxable issues. The revocation of an existing exemption or the substitution of a taxable tax for an exempt tax upsets this relationship and thus takes away the very essence of what the buyer bargained for. In contrast, a situation in which all existing taxes and exemptions remain in place and a new additional tax is placed on all bonds at least maintains the municipal bondholder's relative after-tax yield vis-a-vis comparable taxable issues.

Court. In them, the Supreme Court generally sustained the legislature in applying new taxes to outstanding municipal bonds, except where the Court was clearly asked to approve subjecting outstanding bonds to a tax from which they had previously been exempted when sold. *Compare, McCallen v. Commonwealth of Massachusetts,* 279 U.S. 620 (1929), *reh'g denied,* 280 U.S. 513 (repeal of exemption invalid as applied to existing tax); *with Pacific v. Johnson,* 285 U.S. 480 (1932) (new tax not covered by old exemption). Among the taxes which were so upheld was Indiana's Gross Income Tax, enacted in 1932 and characterized by the state as a "privilege" tax, an indirect tax. *See, J.D. Adams Mfg. Co. v. Storem, supra* at 311. This Court concurred both with the state Supreme Court's interpretation of the nature of the tax and its conclusion that then-existing tax exemption for municipal bonds, first enacted in 1903 and later codified with provisions dealing solely with property tax and poll tax, could not reasonably be construed to apply to such a tax.

However, in 1959 after years of collecting Gross Income Tax on municipal bonds, Indiana passed a General Exemption Statute ("GES") which exempted municipal bonds from Indiana Gross Income Tax. Ind. Code § 6-8-5-1. Gross Income Regulations of the Indiana Department of Revenue issued promptly thereafter made it clear that the GES had exempted from the Gross Income Tax all of the bonds described in the GES. *See,* Section 51, p. 18, Indiana Gross Income Tax Regulation 1959, App. E, pp. 47a. Then, in 1989, Indiana replaced for banks and other financial institutions its Gross Income Tax and a subsequently-enacted alternative Bank Tax with a Financial Institutions Tax, which it imposed upon the municipal bond income of such institutions, chiefly banks. In so doing, it replaced existing indirect taxes, which were tax exempt as respects municipal bonds, with another tax, which was not. This brings the present

fact situation within the ambit of and the ruling in direct conflict with *McCallen v. Commonwealth of Massachusetts, supra,* and also in conflict with cases such as *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977).

McCallen has admittedly been distinguished by other cases such as *Pacific v. Johnson,*[3] but the important distinction betwen the two is factual, not legal, and is found in the differing fact situations underlying the two cases. In *McCallen,* Massachusetts had issued bonds which were exempt from payment of a then existing corporate excise tax, similar to Indiana's, payable by all corporations. That law was later amended to eliminate the prior express exemption from payment of such excise tax on municipal bond income and U.S. Government bonds. Such amendment was held to violate the state's contracts with its bondholders. In comparison, in *Pacific v. Johnson* the municipal bondholder was seeking to be relieved of a tax which was not in existence when the exemption was drafted and the bonds sold. The Supreme Court sustained the California Supreme Court's decision that the fifty year-old exemption did not extend to the new tax. Here we have a situation, like *McCallen* and unlike *Pacific v. Johnson.* FWNC claims, the state admits, and the Tax Court found that the indirect tax FWNC seeks to be relieved of is but the alter ego of similar indirect taxes from which FWNC's municipal bond income was exempt when it bought its bonds. FWNC points to the amendment of the GES as evidence that the exemption it had relied upon, the GES, had been amended just as in *McCallen.* To petitioner's knowledge, there is no case distinguishing *McCallen* and following *Pacific* on similar

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[3] Much of the negative citation in fact involved an issue separate from pure classic Contract Clause analysis relating to discrimination against federal obligations. *See, e.g., Washington v. United States,* 460 U.S. 536 (1983).

facts, *i.e.*, where the state was directly or indirectly revoking a prior tax exemption.[4]

In *United States Trust Co of New York v. New Jersey, supra,* the issue was the ability of the New Jersey legislature to weaken the strength of a statutory limitation on operating deficits by a public entity which had issued certain public bonds, rendering those bonds less secure and less valuable. By weakening the limitation on such deficits the New Jersey legislators negatively impacted the potential amount of net revenue statutorily committed to payment of principal and interest on the bonds, and New Jersey in effect materially altered a valuable privilege which, although embodied in prior legislation, was held by this Court to be incorporated in the bond contracts. Here the Indiana legislature has totally withdrawn a valuable privilege, namely, freedom from Indiana taxes, which impacts significantly upon the value of the bonds in the hands of the holders, and this was also a statutorily based privilege available essential to and incorporated by reference either implicitly or explicitly in the tax opinion contained on the bond form in all bonds held by FWNC. Once it becomes apparent that the Indiana GES had previously covered "indirect" taxes, the decision below of the Indiana Supreme Court is directly contrary to these two cases.

United States Trust Co. also speaks meaningfully to the proper standard of deference to be accorded the measure under review where, as here, the state's own obligations are at issue.

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[4] In *First American National Bank v. Olsen,* 751 S.W.2d 417 (Tenn. 1987), the Tennessee Supreme Court failed to protect public bondholders after an apparent legislative about-face, but that case had a complicating factor. There was an outstanding decision of that state's Supreme Court *antedating the issuance of the bonds* which had held that the state exemption statute for municipal bonds did not apply to franchise tax, *National Life & Accident Ins. Co. v. Dempster,* 168 Tenn. 446, 79 S.W.2d 564 (1935).

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co., supra, at pp. 25-26.

II. THE DECISION BELOW PERMITS THE STATE TO RENEGE AND TO IMPAIR ITS BOND (AND OTHER) CONTRACTS

The Indiana Supreme Court, questioned whether the GES had been incorporated in the Taxpayer's Bond contracts and ignored decisions of this Court, *see, e.g., United States Trust Co. of New York v. New Jersey, supra; Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934), and of the Indiana Supreme Court, *see, e.g., Read v. Beczkiewicz,* 215 Ind. 365, 18 N.E.2d 789 (1939), clearly recognizing that existing law is normally incorporated in bond contracts. Since the Supreme Court determines and is not bound by the state court's ruling on the existence of a contract, *State of Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938); *Appleby v. City of New York,* 271 U.S. 364, 380 (1926), the Indiana Supreme Court's decision must bow to the rules of incorporation recognized and applied in the foregoing decisions. Similarly this Court is not bound by a State Court characterization or construction of its own tax law but determines for itself the reality of a state's tax laws when constitutional issues are involved. See e.g., *Society For Savings In City For Cleveland v. Bowers,* 349 U.S.

143 (1955); *Citizens Bank of Louisiana v. Parker,* 192 U.S. 73 (1902).

At the outset one needs first ask why should this court concern itself with correcting a State Court in interpretation of its own state law. What then is the true importance, the true reason why this Court should correct the decision of the Indiana Supreme Court interpreting a law governing its own obligations? First of all, as noted above, the impairment was material and went to the essence of the bargain. Secondly, the decision potentially impacts the interests of the many, many similarly-situated bondholders holding literally billions of dollars of Indiana municipal bonds and trillions of dollars of such bonds when other states' bondholders are considered. Thirdly, the case has significance well beyond the particular type of contract. It extends to all types of state contracts the essential terms of which are provided in large part by underlying legislation, including both employment contracts and pensions for state and local employees in Indiana and elsewhere.

Claims on states through their municipal bonds and through their state employee salaries and pensions represent a large part of the collective wealth of Americans. These rights are subject to manipulation in a variety of ways which threaten the sanctity of the contract involved. Recently, we have had attempted state pay reductions, *see, Condell v. Bress,* 983 F.2d 415 (2d Cir. 1993), *cert. denied Bress v. Condell,* 6113 S. Ct. 1849 (1993) (federal court strikes down as in violation of Contract Clause), *see also, In Re Workers' Compensation Refund Western National Mutual Ins. Co.,* 46 F.3d 813 (8th Cir. 1995) (Insurers surplus fund protected); we have had pension "revision" eliminating a tax exemption, *see Hughes v. Oregon,* 314 Or. 1, 838 P.2d 1018 (1992) (state court effectively sanctioned impairment in large part by declaring law to be merely a breach, not an impairment for which an unspecified remedy would be pro-

vided. U.S. Contract Clause held ineffective to prevent because there was breach not impairment); we have had a state decision invalidating the contracts on which municipal bonds depended, *see, Chemical Bank v. Wash. Pub. Power Supply,* 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied, Haberman v. Chemical Bank,* 471 U.S. 1065 (1985), *see also, Booth v. Sims,* 456 S.E.2d 167 (1994), [Supreme Court of Appeals of West Virginia] (pension reduction sustained in part, held invalid in part); and now, in this case, we have "takebacks" of tax exemptions as respects outstanding bonds originally sold as tax-exempt and at below market interest rates by reason of such exemption, *Indiana Dep't of Revenue v. Fort Wayne Nat'l Corp., supra.* Constitutionally-protected contract rights of bondholders are ordinarily not involved in repeals of tax exemptions, but they are here where the exemption is incorporated in and becomes a part of the state's own bond contract. Indeed, as the Court aptly commented in the above quotation from *United States Trust Co. v. New Jersey, supra,* watering down a state's own financial obligations is an area where the legislative action is subject to special scrutiny. *Ibid.* at pp. 25-26.

A comparison of the state court cases cited above with the differing results obtained in federal court cases cited above suggests that the U.S. Supreme Court should be especially vigilant where a state's own obligations are involved and where a claimant's remedies are restricted, as FWNC's were in this case, to an action in a state court. The temptation of the lower state court to defend the state's treasury may be almost as great as its legislature's. Indeed, a review of the foregoing state courts' treatment of recent Contract Clause claims reveals the emergence of various theories of impinging on the rights of persons holding contracts with the state. For example, in *Hughes v. Oregon, supra,* the Supreme Court found the provision repealing the exemption did not effect an infringement but only a breach of the contract, for which some unspecified remedy was available. Presumably this would be in dam-

ages, which would likely be less valuable to the Petitioners than striking down the law. More obliquely, in *Booth v. Sims, supra,* the West Virginia Supreme Court declared that it would announce when the state employees had participated in the system long enough to have substantially relied to their detriment so as to entitle them to protection. *Ibid.* at pp. 184-185.

Here, as discussed above, we have an attempt to make infringement disappear by accepting an improper "construction" of the original GES statute which is contradicted by the same court's own construction of the nature of the Gross Income Tax in an earlier similar case. If the Contract Clause is to have real meaning to prevent a state's financial abuse in respect of its own financial obligations, the Supreme Court should act to prevent these distortions of the generally understood meaning of the Contract Clause. This is not an area in which the Court can rely upon the political process in the states to provide the necessary protection.

The particular issue on which impairment turns in this case, resolved in FWNC's favor by the Indiana Tax Court and adversely to FWNC by the Indiana Supreme Court, was the scope of Indiana's GES, specifically whether it had prior to 1989 included indirect taxes or not. The Indiana Supreme Court reached its conclusion that the GES had not covered indirect taxes by totally ignoring the overwhelming weight of historical evidence that the GES had previously covered indirect tax (the aforesaid Gross Income Tax, for one) and ignoring all of the various rules of construction found applicable by the Indiana Tax Court, which had led it to the conclusion that the GES had covered such taxes.

In effect, the Indiana Court chose to prefer the canon of seeking to reconcile two apparently conflicting statutes over four or five competing canons of construction pointing directly to an irreconcilable conflict between the two statutes. The problem with the Supreme Court's decision

is that nowhere does it explain how the GES had come to cover only direct and not franchise and other indirect taxes, when it clearly had covered at least one indirect privilege tax, the Indiana Gross Income Tax, and when the Indiana legislature thought it necessary to amend the GES by adding an additional exception for the FIT to be certain the GES did not apply.[5] What we have, then, is a state court reaching a result favorable to the state and its treasury by interpreting its own state's law in a manner which flatly contradicts the previously commonly accepted understanding of that law, indeed contradicts its own characterization of the Gross Income Tax. This Court is not required to accept the Indiana Supreme Court's assertion that the emperor is wearing clothes. It is free, indeed obligated, as recognized in *Citizens Bank* and *Society for Savings*, *supra*, to expose the nakedness of the lower state court's ruling in the course of carrying out its duty of protecting the affected Bondholder's constitutionally-protected rights against legislative impairment of its various bond contracts.

This role of the U.S. Supreme Court was set forth by it in another case arising from Indiana in which the Indiana Supreme Court had, by restrictively reinterpreting earlier state statutes which were the foundation of the realtor's alleged contract rights, denied the existence of a contract. *See*, *State of Indiana ex rel. Anderson v. Brand*, *supra*. Rejecting the Indiana Supreme Court's interpreta-

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[5] The original GES as it existed up until 1989 contained only one express exclusion—for inheritance tax, which is a form of indirect or privilege tax. See pp. 2-3 and App. C, p. 30a. In 1990 the Indiana legislature amended the GES and twenty or more similar exemptions for specific types of bonds to add the FIT as an additional specifically recognized exception to the general rule of exemption. See App. C, pp. 30a-31a. In 1991 it further revised the GES and the other bond statutes by deleting the 1990 specific exception for FIT tax from paragraph (a) of Ind. Code 6-8-5-1 and by adding it as new subsections (c) and (d). See App. C, pp. 31a-32a.

tion of Indiana Law on which its decision was based, this Court held:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the state's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts."

Ibid., at 100 (footnote omitted).

Under the lower state Court's theory of reconciliation by judicial rewriting, there would never be a legislative impairment of a state law which had been incorporated in a contract because the reconciling "construction" of the earlier statute to comport with the later conflicting, in substance amending, statute in effect rewrites that earlier legislative contract to eliminate an otherwise obvious impairment. Clearly the impairment is no less legislatively driven where the legislature first passes a statute conflicting with an earlier one and then amends the earlier statute to eliminate the conflict, stating at the same time that the amendment was unnecessary, and the state court then simply accedes to such legislative action. The concept of reconciling conflict between earlier and later statutes [6] must give way to a recognition of constitutional rights arising under the earlier statute and protected by the Contract Clause and cannot become a basis for riding roughshod over those rights.

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[6] The theory underlying the canon of reconciliation, which assumes that the later legislature knew what was intended by an earlier legislature, breaks down entirely where, as here, not one member of either body of the Indiana legislature which passed the first statute held such office when the conflicting statute was passed thirty years later.

The question for the Supreme Court then becomes whether the Indiana Supreme Court's conclusion that the GES had not covered indirect taxes is credible. The evidence that it is not is found in a comparison of those portions of the two lower court decisions bearing on this particular issue. *Compare Fort Wayne Nat'l Corp. v. Ind. Dep't of Revenue*, *supra*, at 668, 671-672, [App. B, pp. 16a-19a] (on the issue of the scope of the GES) *with Indiana Dep't of Revenue v. Fort Wayne Nat'l Corp.*, *supra* at 109, 112-114 [App. A, pp. 7a-10a] (on this same issue). The Tax Court's opinion addressed multiple canons of construction. The Indiana Supreme Court does not. The Tax Court focuses on the prior coverage by the GES of the Gross Income Tax. The Indiana Supreme Court leaves it unexplained. Indeed, that Supreme Court spends its greatest effort refuting a straw-man argument, which it claims FWNC made to the effect that by enacting the GES the State legislature had intended to exempt its banks from federal taxation. *See Ibid.* at p. 113. See App. A, pp. 7a-9a. *In fact, FWNC never, ever made any such argument.* Such analysis answers the question. The decision of the Indiana Supreme Court is simply wrong and not entitled to acceptance by this Court. More importantly as discussed above, it is the role of this Court in our system to protect the Constitution against state court decisions which would erode its provisions, particularly where persons asserting these rights must do so in state courts.

III. THE DECISION BELOW LEFT UNANSWERED THE IMPORTANT QUESTION WHETHER THE CIVIL RIGHTS ACT IS AVAILABLE FOR A VIOLATION OF THE CONTRACT CLAUSE OF THE CONSTITUTION

The inclusion or non-inclusion of the Contract Clause in the scope of protection afforded by the Civil Rights Act is an issue lower courts have resolved in different ways. *Compare Poirier v. Hodges*, 445 F. Supp. 838

(M.D. Fla. 1978), *with District Council 33 v. City of Philadelphia*, Civ. No. 92-3579, 1993 U.S. Dist. LEXIS 944 (E.D. Pa. 1993).

The Indiana Tax Court in its analysis on the issue below concluded that, even if there was a contract which had been legislatively impaired, relief was still not available under 42 U.S.C. § 1983 because, among other reasons, the case fell within the rule of *Carter v. Greenhow*, *supra*; *see*, *Fort Wayne Nat'l Corp. v. Ind. Dep't of Revenue*, *supra* at fn 6, p. 676. It interpreted *Carter v. Greenhow* as holding that the Civil Rights Acts did not extend to Contract Clause claims. Indeed, the idea that *Carter v. Greenhow* stands for such a result has achieved fairly wide currency. Both because of the differing results reached and because the negative side of such analysis fundamentally mistakes the Court's recent decisions on the scope of the Civil Rights Acts, 42 U.S.C. § 1983 in cases such as *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1970), (both involving constitutionally-based rights), the Court should resolve this issue in favor of the incorporation of the Contract Clause within the scope of rights protected by the Civil Rights Acts.

The case of *Carter v. Greenhow*, properly construed, does not stand for the holding that the Indiana Tax Court and others have ascribed to it. Essentially, what the court in *Carter v. Greenhow* held was that the plaintiff had followed the wrong procedure for asserting his rights. As the Court said at p. 332 of its opinion, "But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." This is the reading of *Carter v. Greenhow*, which the majority in *Dennis v. Higgins*, *supra*, adopted. *See*, *Ibid.* at p. 451 n.9.

Furthermore, the ruling in *Dennis v. Higgins* that the provisions of 42 U.S.C. § 1983 applied to actions to assert the protection of the Commerce Clause against

state action should control the result with respect to the Contract Clause. This was recognized by the dissenters in *Dennis v. Higgins*, *supra*, who, in protesting the interpretation of the Civil Rights Act as providing protection of the Commerce Clause, noted referring to *Carter v. Greenhow*, "The Commerce Clause is, if anything, a less obvious source of rights [than the Contract Clause] for purposes of § 1983, as its text only implies a limitation upon state power." *Dennis v. Hughes*, *supra*, at p. 458.

Accordingly, FWNC urges this Court to accept this case and resolve this important issue in favor of inclusion of the Contract Clause within the scope of the Civil Rights Acts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Indiana. Alternatively petitioner suggests that, even if the issues involved do not merit plenary consideration by the Court, the interest of this Court in protecting both the Contract Clause and its decisions on such clause from subversion by decisions such as the present would warrant a summary reversal of the decision of the Indiana Supreme Court and either an affirmance of the Indiana Tax Court's decision or a remand with a direction to the Indiana Supreme Court to reconsider the case on the assumption the GES had covered indirect taxes and that *United States Trust Co. of New York v. New Jersey* applies. Such treatment was deemed appropriate in *Norwest Bank of Duluth NA v. James*, 501 U.S. 1246 (1991) and *Norwest Bank Duluth NA v. McClung*, 113 S. Ct. 3026 (1993), each involving very similar issues, and would be appropriate here.

Respectfully submitted,

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